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IN THE

Supreme Court of the United States

NATIONAL INSTITUTE OF MILITARY JUSTICE,
Petitioner,

v.

UNITED STATES DEPARTMENT OF DEFENSE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE NATIONAL SECURITY ARCHIVE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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INTEREST OF THE *AMICUS CURIAE* THE NATIONAL SECURITY ARCHIVE [1]

The National Security Archive ("the Archive"), a non-profit independent research institute and library, has a significant interest in the appropriate application of statutory exemptions from the policy of broad disclosure of government information embodied in the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA").

[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Established in 1985, the Archive collects and publishes documents on topics pertaining to the national security, foreign, intelligence, and economic policies and decision making of the United States. The Archive obtains materials through a variety of methods, including requests for government disclosure pursuant to FOIA. In 2007 alone, the Archive filed 1,813 FOIA requests with 91 agencies and pursued 363 agency administrative appeals. The Archive has litigated over 20 cases challenging agency record denials based on FOIA exemptions.[2] Amicus briefs of the Archive have been considered in FOIA cases before this Court, including most recently in *Taylor v. Sturgell*, 128 S. Ct. 2161, 2177 (2008).

The efforts undertaken by the Archive to seek the disclosure of, and make available to the public, records detailing government decision making are instrumental to realizing FOIA's purpose of providing citizens with knowledge of the operations of their government and to enable public scrutiny essential to the functioning of democracy. *See Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 16 (2001) ("Congress believed [FOIA] . . . would help 'ensure an informed citizenry vital to the functioning of a democratic society'") (citation omitted); *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 772-73 (1989) (FOIA's "basic policy of 'full agency disclosure unless information is exempted under clearly delineated statutory language,' indeed focuses on the citizens' right to be informed about 'what their government is up to'") (citation omitted). In its extensive FOIA activities,

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[2] *See, e.g., Nat'l Sec. Archive v. Dep't of the Air Force*, No. 05-571 (RMG), 2006 U.S. Dist. LEXIS 21037 (D.D.C. Apr. 19, 2006); *Nat'l Sec. Archive v. FBI*, 759 F. Supp. 872 (D.D.C. 1991).

the Archive relies on the view this Court articulated in *Klamath*, specifically, the Court's guidance that the intra-agency memoranda or letters exemption, 5 U.S.C. § 552(b)(5) ("Exemption 5"), does not allow a federal agency to refuse disclosure of documents reflecting communication between the agency and a private, non-governmental party with whom it has no formal employment relationship. *Klamath*, 532 U.S. at 10-11 (limiting the "consultant corollary" of Exemption 5 to "communications between Government agencies and outside consultants *hired* by them") (emphasis added).

The 19 records sought by Petitioner containing opinions solicited by the Department of Defense ("DoD") from non-governmental lawyers to promulgate regulations under President Bush's November 2001 military order, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 6 Fed. Reg. 57,833 (Nov. 13, 2001), are highly relevant to understanding national security decision making. Therefore, the Archive, on behalf of the public, has a strong interest in the disclosure of these particular documents as well as in the implications of the lower court's ruling for future FOIA requests concerning national security decision making.

In the decision below, the D.C. Circuit upheld DoD's denial of Petitioner's request for these 19 records by expanding the retained consultant corollary discussed in *Klamath* to include documents reflecting opinions from *anyone* from whom an agency chooses to solicit advice, even if there is no formal employment relationship between the advisor and a federal agency. (Pet. for Writ of Cert. App. A at 13a.) This overbroad interpretation of Exemption 5 breaks the limits set by this Court for what types of

documents will be considered intra-agency memoranda and letters. A review of FOIA request handling by 25 agencies and departments found a 95% increase in reliance on Exemption 5 as a basis for refusing disclosure of government records in the past decade. See Coalition of Journalists for Open Government, *An Opportunity Lost, Part 1, An In-depth Analysis of FOIA Performance from 1998 to 2007* 10 (July 3, 2008) (reporting 34,587 denials based on Exemption 5 in 1998 and 67,561 denials in 2007). The D.C. Circuit's decision in the case below, if left standing, threatens to encourage agencies to further expand their reliance on Exemption 5 and improperly refuse disclosure of documents the Archive will request in the future. It is strongly in the interest of the Archive, as a frequent FOIA requestor that seeks records concerning policy and decision making, for the Court to review the decision below and clarify the limits of Exemption 5.

SUMMARY OF ARGUMENT

By allowing federal agencies such as DoD to keep secret communications with selected private individuals, the D.C. Circuit has thwarted Congress's dominant policy objective behind FOIA that advances broad disclosure of government information, limited only by specifically stated and narrowly construed statutory exceptions, so as to facilitate maximum public scrutiny of government decision making. *See Dep't of the Air Force v. Rose*, 425 U.S. 352, 360-62 (1976) (reviewing legislative history in S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965) and citing *EPA v. Mink*, 410 U.S. 73, 79-80 (1973)). The D.C. Circuit effectively has rewritten the FOIA *intra-agency* memoranda and letters exception to make documents reflecting the advice of *selected non-governmental*

private attorneys commenting on draft regulations protected from disclosure. This departure from the plain and apparent meaning of the statutory text defies the precept that FOIA exemptions be construed narrowly in favor of disclosure.

Should an agency require input from private citizens, it should follow the myriad procedures permitted under the law, including soliciting public comment or establishing a federal advisory committee. To obtain secrecy in its deliberative communications with an advisor, however, Exemption 5 protection can be attained only by entering a formal employment relationship, which would provide accountability and conflicts of interest protections. The decision below improperly allows Exemption 5 to protect the very type of closed door and special interest decision making that the transparency laws were designed to open up to public scrutiny. Thus, it creates a gaping hole in the law Congress enacted to protect the public's interest in accountable government decision making and will have a significant impact on future FOIA requests to government agencies. The Court should grant *certiorari* to clarify that communications with private persons, who owe none of the safeguarding duties of public servants, are not exempt from FOIA disclosure as intra-agency memoranda and letters.

ARGUMENT

I. The D.C. Circuit's Holding Frustrates the Objectives of FOIA and Other Open Government Laws by Permitting Federal Agencies to Receive Secret Advice from Private Parties

Public access to information concerning government activities, including the advice and views private individuals contribute to agencies, is a fundamental principle advanced by federal statutes. In refusing to disclose the comments it elicited from select private individuals, DoD drew its decision making behind closed doors in contravention of the objectives of the body of federal law promoting open and publicly accountable government.

FOIA mandates complete openness, with only carefully delineated exemptions from that general rule. *See Rose*, 425 U.S. at 360-61. In enacting the law, Congress sought to "'enable the public to have sufficient information in order to be able, through the electoral process, to make intelligent, informed choices with respect to the nature, scope, and procedure of federal governmental activities,'" *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 17 (1974) (citation omitted), and to prevent the damage that pervasive secrecy in government agencies does to public confidence. *See* S. Rep. No. 813, 89th Cong., 1st Sess., 10 (1965) ("A government by secrecy benefits no one. It injures the people it seeks to serve; it injures its own integrity and operation. It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty.").

Similarly, under the Administrative Procedure Act ("APA"), either through informal notice-and-comment

proceedings, 5 U.S.C. § 553, or formal on-the-record rulemaking, 5 U.S.C. §§ 556, 557, agencies are directed to avail themselves of the views of interested persons and the public with transparency. *See NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969). The purpose of these procedures is "to assure fairness and mature consideration of rules of general application." *Id.*

Likewise, under the Federal Advisory Committee Act ("FACA"), Congress recognized that seeking advice from private citizens can be a "useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government." 5 U.S.C. App. 2 § 2. In seeking private input, however, Congress sought to protect public decision making from any inappropriate influences by legislating safeguards to ensure public scrutiny of advisory committee activities. These measures include public notice of and access to meetings, unless the President or relevant agency head determines that the meeting may be closed under exceptions set forth in the Government in the Sunshine Act, 5 U.S.C. § 552b(c). 5 U.S.C. App. 2 § 10(a)(1)-(3); (d). Also, FACA requires public availability of meeting minutes as well as documents prepared for or by advisory committees, subject to exemptions available under FOIA. 5 U.S.C. App. 2 §§ 10(b)-(c); 11; *see generally Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 446, 459 (1989) (FACA's principal purpose is to enhance accountability by allowing the public to monitor the existence, activities, and cost of advisory committees); *Animal Legal Defense Fund Inc. v. Shalala*, 104 F.3d 424, 426-27 (D.C. Cir. 1997) (FACA demands public access to documents concerning private experts selected by the National Academy of Sciences to serve on a committee advising on laboratory

standards); *Nat'l Anti-Hunger Coal. v. President's Private Sector Survey on Cost Control*, 711 F.2d 1071, 1072 (D.C. Cir 1983) (FACA is intended "to open to public scrutiny the manner in which government agencies obtain advice from private individuals") (citations omitted).

In the present case, where DoD did not engage in APA rulemaking or establish an advisory committee under FACA when it elicited the views of non-governmental lawyers on draft regulations for military tribunals, FOIA functions to ensure public accountability for decisions based on private comments. By stretching the meaning of the term "intra-agency" in Exemption 5 past its breaking point, the D.C. Circuit effectively has nullified this safeguard. It has given a green light to agencies to shroud their communications with selected private individuals in secrecy, creating a hole in the framework of federal open government laws which Congress did not intend.

II. Any Potential Benefit to Be Gained from Keeping Communication with Private Citizen Advisors in Confidence Does Not Justify the Court of Appeals' Rewriting of FOIA Exemption 5

Although, as the D.C. Circuit noted, "the expectation that communications will remain confidential is crucial to eliciting candid and honest advice from outside consultants" (Pet. For Writ of Cert. App. A at 18a), the benefit presumably derived from keeping communications secret is no license to obliterate all meaning of the term "intra-agency" from the statute. *See Klamath*, 532 U.S. at 11-12 (promotion of "frank communication" does not justify reducing intra-agency to "a purely conclusory term"). This Court

has emphasized that FOIA exemptions are intended to have a "meaningful reach and application" while achieving a "workable balance" between the public right to know and the legitimate needs of agencies to keep certain information in confidence. *See John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152-53 (1989). In balancing the interests at stake, courts should follow "the clear provisions" of FOIA and narrowly construe any ambiguities "in favor of disclosure." *Id.* at 164 (Scalia, J., dissenting) (stating adherence to this approach will "reduc[e] the volume of litigation and mak[e] it inescapably clear to Congress what changes need to be made").

To prevent an impermissible judicial expansion of Exemption 5, the Court should grant review and articulate clear guidance on the breadth of that exemption. A requirement that agencies enter formal employment relationships with non-governmental advisors before earning Exemption 5 coverage, as posited in *Klamath*, would reduce, if not eliminate, the present uncertainty among agencies and FOIA requestors and claimants regarding the reach of Exemption 5. *See U.S. Dep't of Justice v. Julian*, 486 U.S. 1, 14 (1988) (stressing that Congress intended workable rules for determining whether particular material may be withheld or must be disclosed).

III. By Granting Exemption 5 Protection to Advice from Private Individuals, the D.C. Circuit Encourages Avoidance of Government Ethics Laws, Reducing Recourse for Seeking Public Accountability

If an agency believes it must assure confidentiality to obtain candid advice from private individuals, the

agency may hire them, with or without pay, and bring them within the agency to achieve Exemption 5 protection from disclosure of related documents. Under current federal regulations, an individual "retained, designated, appointed, or employed to perform temporary duties either on a full-time or intermittent basis, with or without compensation, for a period not to exceed 130 days during any consecutive 365-day period" is considered a "special Government employee." *Standards for Ethical Conduct for Employees of the Executive Branch*, 5 C.F.R. 2635.102(l) (following the definition codified at 18 U.S.C. § 202(a)). Once engaged in a formal employment relationship with a federal agency, special government employees are obliged to act in service of the public by adhering to the principles of ethical conduct set forth in 5 C.F.R. 2635, including conflict of interest and disqualification provisions, as well as fulfill financial disclosure obligations depending on level of pay and expected time commitment of position in accordance with 5 C.F.R. 2634.202 and 2634.204. Furthermore, special government employees fall under the jurisdiction of federal bribery and conflict of interest criminal statutes. *See, e.g.*, 18 U.S.C. §§ 201, 203, 205, 207, 208, 209. Thus, when agencies establish formal employment relationships with advisors, despite the possible unavailability of information to the public through FOIA, Congress has put in place other mechanisms to ensure that individuals who advise the government act with commitment to the public interest.

Here, however, the private individuals from whom DoD solicited and obtained advice owed none of the obligations owed by government employees. In this circumstance, disclosure of that advice is mandated under FOIA to enable government accountability to

the public for the decisions it made based on that advice. By obviating formal engagement of an outside advisor to ensure Exemption 5 protection, the decision of the D.C. Circuit simultaneously undermines the objectives of both open government laws and government ethics laws. Review should be granted to eliminate this undesirable ethical consequence of overextending the scope of Exemption 5.

CONCLUSION

For the reasons stated above, the petition for writ of *certiorari* in the above captioned case should be granted.

Respectfully submitted,

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